MASTER AND SERVANT—SERVANT'S ASSUMPTION OF RISK OF MASTER'S BREACH OF STATUTORY DUTY.—The question as to whether a servant can assume the risk of injury caused by the master's failure to take precautions required by the statute for his protection was recently decided in Virginia. In *Carter Coal Co.* v. *Bates*[1] it was held that a mine employee, by continuing to work in a mine with knowledge of the employer's failure to provide for the carrying of a conspicuous light on the front of every trip or train of cars, as required by statute, did not assume the risk of injury from such breach of duty. Prior to the decision of this case this question was an open one in Virginia. Although raised in an earlier case,[2] the court held that it was unnecessary to decide the question.

As to whether the effect of a statute imposing duties on a master abolishes by implication the defense of assumption of risk, the authorities are in serious conflict, the jurisdictions being well-nigh equally divided on the question.[3] Without attempting any review of the authorities it may be of interest on a matter of such practical importance and effect, to note a few of the leading authorities on both sides of this question.

Among others, the States denying that the assumption of risk is abolished by such statutes are New York,[4] Massachusetts,[5] Iowa,[6] and Rhode Island.[7] In some of the Federal courts, where the question has been considered as one of general law and not as a question on which such courts were required to follow the decisions of the courts of the States in which and under the statutes of which the actions respectively arose, the doctrine is also denied.[8] These decisions are based on the reasoning that the doctrine of assumption of risk does not depend upon *contract* relation between master and servant but is an old, established principle of the common law, *volenti non fit injuria*, and must be repealed, if at all, by a clear expression of intention on the part of the legislature. In the leading case of *Denver & R. G. R. Co.* v. *Norgate*,[9] the court said:

> "The law regarding the assumption of risk is the law which governs the relation of master and servant, and is independent of the will of either. It is not a term of the contract of employment. If it were then the master and servant could

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[1] 105 S. E. 76.
[2] Virginia Iron, Coal and Coke Co. *v.* Asbury's Adm'r., 117 Va. 683, 86 S. E. 148.
[3] For a review of decisions, Note, 6 L. R. A. (N. S.) 981.
[4] Knisley *v.* Pratt, 148 N. Y. 372, 42 N. E. 987, 32 L. R. A. 367.
[5] O'Maley *v.* South Boston Gaslight Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161.
[6] Martin *v.* Chicago R. I. & P. R. Co., 118 Iowa 148, 91 N. W. 1034.
[7] Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910.
[8] Denver and Rio Grande Railroad Co. *v.* Norgate, 141 Fed. 247, 6 L. R. A. (N. S.) 981. *Contra.* See *post*, note 14.
[9] *Supra.*

> retain it or abolish it in each contract of employment. But they can do neither. It is a principle of the common law, and must be repealed, if at all, by the lawmaking power."

On the other hand there is a considerable list of cases in several States which have adopted the contrary doctrine, denying that a servant can assume the risk of injury caused by the master's violation of a statutory regulation for the servant's protection. Among the States in which this doctrine prevails are Illinois,[10] Indiana,[11] Michigan,[12] and Missouri.[13] This view is also held by some of the Federal courts.[14] Most of these decisions are based on the theory that the doctrine of assumption of risk is contractual and that to allow the servant to waive by contract, express or implied, the performance of the statutory duty of the master imposed for the protection of the servant would be to nullify the object of the statute.

While admitting that the opposing doctrine is not without some force and logic, it would seem that it is based on argument too refined and that the Virginia Court arrived at the sound and correct solution of the question, both on principle and well reasoned authority. The question discussed in many of the cases as to whether the doctrine of assumption of risk is based on contract or is a common law principle would seem to be immaterial. Granted that it is a common law principle, can not the statute, if not expressly, by implication repeal it? Then the question to determine is whether the statute did not by *necessary* implication accomplish this. To arrive at a proper construction of a statute the purpose for which it was enacted and the evils which it was intended to abolish should be inquired into. The evident purpose of the enactment of such statutes is well expressed in *Pocahontas Consolidated Collieries Co.* v. *Johnson*.[15] The question in this case arose under a violation of the same Virginia statute and under facts very similar to the Bates Case.[16] Judge Woods in delivering the opinion of the court said:

> "The primary and insistent necessity for their enactment is that men will work in mines and other dangerous places at the constant risk of death or injury whether such precautions are taken for their safety or not. The Legislature assumed that men will work in the mines without the protection of the required lights; otherwise the enactment would not have been necessary. In this case it is probable there

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[10] See Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371.
[11] Island Coal Co. *v.* Swaggerty, 159 Ind. 664, 65 N. E. 1026.
[12] Murphy *v.* Grand Rapids Veneer Works, 142 Mich. 677, 106 N. W. 211.
[13] See Bair *v.* Heibel, 103 Mo. App. 621, 77 S. W. 1017.
[14] Narramore *v.* Cleveland, C. C. & St. L. R. Co., 96 Fed. 298, 48 L. R. A. 68; Pocahontas Consol. Collieries Co. *v.* Johnson, 244 Fed. 368, Knapp, J., dissenting.
[15] *Supra.* [16] *Supra.*

was not a man less in the mines because of defendant's failure to provide the safeguard of a light on the front of moving cars. Hence the precautions which the Legislature regards obviously necessary to safety it places out of the domain of waiver by the employee or of contract, either express or implied, between the parties, and requires such precautions as a matter of public policy, under the sanction of penalties inflicted for failure to provide them."

If the conclusion as reached by the Virginia Court is not correct, then as truly said by Judge Sims, in delivering the opinion of the Bates Case,[17] "the statute may be nullified and set at naught by the flagrant and systematic violation of it."

R. C. S.

MEASURE OF DAMAGES—*P. Lorillard Co.* v. *Clay* (Va.), 104 S. E. 384.—The plaintiff below suffered the loss of an eye during the course of his employment by the defendant company. The decision of the case in favor of the plaintiff and the award of $15,000 in damages was the subject of review by the Supreme Court of Appeals. The chief contention upon which the appeal was based and a new trial asked, was that the jury had been prejudiced by the improper arguments of counsel, tending to array labor against capital, men against corporations, etc. The Appellate Court, reviewing the amount of damages awarded for similar injuries, and approved by the supreme courts of other States, decided that the jury had been led by the improper arguments of counsel to award excessive damages, and, refusing to remand for new trial, reduced the verdict to $10,000.

This decision is severely criticized in 6 VA. L. REG. (N. S.) 618. It is there remarked that decisions in other States as to what constitutes compensation for the loss of an eye can have no bearing upon a particular case in this State. The proper action, it is thought, would have been to set the case aside for new trial —"not upon the measure of damages, but upon the fact that the jury was prevented from being impartial by the arguments used by counsel."

It is hard to see how the court, avowedly convinced that the jury did not err in fixing the *existence of liability* on the part of the defendant, would have been justified in ordering a new trial. The court is, itself, in as good a position to determine the *extent of the liability* as a new jury would be. It seems to us that the court was in duty bound not to order a new trial, but, if convinced that the verdict was excessive, due to the improper arguments of counsel, simply to reduce it, and end the matter there.

We agree that the decisions in other States are ordinarily of little value in fixing damages in a particular case in Virginia. But

[17] *Supra.*